

FEB 17 1998

Before the
Federal Communications Commission
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

TO: The Commission

**REPLY COMMENTS OF
 CHANNEL TWENTY TELEVISION COMPANY, L.L.C.**

Channel Twenty Television Company, L.L.C. ("CTTC"), by counsel, hereby
 replies to comments submitted in response to the *Notice of Proposed Rulemaking*, FCC
 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.¹

1. *Introduction.* On October 6, 1997, the FCC's Television Branch approved a
 settlement among competing applicants for a construction permit for a new television
 station on Channel 20 at Salt Lake City, Utah, granting the application of CTTC. Two
 days later, Garry Spire, one of the dismissed applicants, gave notice of his intent to

¹ 62 Fed. Reg. 65392 (Dec. 12, 1997).

terminate the Settlement Agreement as of October 18, 1997. He subsequently filed a petition for reconsideration of the grant to CTTC, relying on the ridiculous argument that the Commission had backdated its approval of the settlement.

While Spire now seeks to revive his dismissed application on the thinnest of pretexts, that effort should prove unavailing because, *inter alia*, his application was never grantable in the first place. His proposed antenna site was never available to him.

2. *The FCC's Proposal To Eliminate the Site Certification Requirement.* At Paragraph 81 of the *NPRM*, the FCC tentatively proposes "to eliminate the requirement that applicants certify they have a 'reasonable assurance' that the specific sites proposed as the location of their transmitting antennas will be available." Rather than site certifications, the Commission would "rely on strict enforcement of our existing construction requirements to ensure that winning bidders in future broadcast auctions construct their facilities in a timely manner," noting that the same procedure has been adopted in MMDS. *NPRM* n. 42.

The majority of those commenters responding to the FCC's proposal to abolish site certifications urged that it *not* be adopted.² CTTC wholeheartedly agrees. For a variety of reasons, elimination of the site certification requirement would be ill-advised.

² See, e.g., Comments of: Rio Grand Broadcasting Company, at 17; Six Video Broadcast Licensees, at 7; Independent Broadcast Consultants, Inc., at 5; Communications Technologies, Inc., at 3; Positive Alternative Radio, Inc., at 6; Todd Stuart Noordyk, at 5; Batesville Broadcasting Company, Inc., at 5; Tri-County Broadcasting, Inc., at 4, 5; Jacor Communications, Inc., at 6; The Association of Federal Communications Consulting Engineers, at 1-5, John Anthony Bulmer, at 3; Michael R. Ferrigno, at 9; Hatfield & Dawson Consulting Engineers, at 2; Jeffrey N. Eustis, at 2 and Donald James Noordyk, at 5.

A. *Considerations specific to pre-July 1, 1997 applicants.* First, with respect to any pre-July 1, 1997 applicants, the retroactive repeal of the site certification policy would unfairly prejudice applicants who expended time, money, and other resources in order to comply with the stringent requirements of the current rule. Their good faith reliance on the procedures extant at the time their applications were filed establishes a genuine reliance interest. *See, e.g., Boston Edison v. Federal Power Comm'n*, 557 F.2d 845 (D.C. Cir. 1977).

By the same token, for applicants such as Spire, who have shown their willingness to flout basic FCC rules, evidence of that proclivity cannot be ignored or extinguished by a retroactive repeal of the site certification rule. Such evidence, where it has already come to light, bears on an applicant's character qualifications. The FCC would be ill-advised to discard evidence of the disposition of a potential licensee to be a reliable and trustworthy steward, on the one hand, or to prevaricate for its private advantage, on the other.

Accordingly, whatever the ultimate outcome of the proposal to eliminate site certifications, in no event should the rule change be given retroactive applicability so as to effectively exonerate an applicant who has violated the current rule by falsely certifying the availability of its site.

B. *General considerations.* Moreover, in the broadcast services, a valid transmitter site is the *sine qua non* of an applicant's technical proposal, and is often

the most difficult step in the process of creating a grantable application. If the site certification requirement is discarded, an aggressive bidder could propose a tower location virtually anywhere -- authorized or not -- and the FCC presumably would grant the application if it otherwise complied with the rules. The absence of the requirement would invite the sort of abuse that the FCC purports to avoid whenever it repeals rules in the name of parsimony, administrative efficiency or paperwork reduction. Here, the advantage of simplifying the application process cannot seriously be deemed to outweigh the abuses that would surely follow -- abuses long held to be contrary to the public interest.

Aside from this prudential reason for preserving the rule, the elimination of the certification requirement may well be legally problematic. Section 308(b) of the Communications Act requires that “[a]ll applications for station licenses, . . . shall set forth such facts as the Commission by regulation may prescribe as to the . . . technical and other qualifications of the applicant to operate the station.” Because site availability is such an essential dimension of any *bona fide* technical proposal, the repeal of the certification requirement -- without any obvious public interest benefit -- may well exceed the FCC’s proper statutory authority. That misstep would not be unlike the FCC’s ill-fated construction of the Act’s petition to deny procedure, castigated by the Court of Appeals in *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988). There, the Commission’s error lay in its reading out of

the Act a fundamental dimension of the agency's responsibility to regulate in the public interest. As the Court held, the statute effectively requires the agency to "look for fire when it is shown a good deal of smoke." The Commission's failure to do so constituted reversible error. The Commission risks committing a similar lapse of its regulatory duty -- by licensing applicants who are not technically qualified -- if it adopts the *NPRM*'s proposal to eliminate site certifications.

The FCC's proposal is all the more problematic because the approach it offers as a substitute to certification -- strict enforcement of construction deadlines -- is not a valid alternative. The case will often arise, because of the unique nature of acquiring a broadcast antenna site, that unexpected delays (such as zoning approvals) will impede a wholly *bona fide* permittee from timely construction. In that event, the "strict enforcement" of construction deadlines would only shift the penalty of delay to the wrong party.

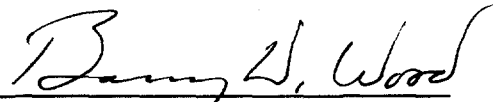
This particular feature of a broadcast applicant's proposal distinguishes the MMDS context cited by analogy in the *NPRM*. In MMDS and other super high frequency services, relatively small antennas (as compared with broadcast operations) on relatively short towers are typically used. Thus, the antenna technology encountered in MMDS is such that the logistical obstacles confronting broadcasters are ordinarily not in play.

3. *Conclusion.* For the above reasons, CTTC supports the sound position that

the FCC should retain the current requirement that broadcast applicants certify the availability of their proposed transmitter sites, particularly as to applications which have already been filed on FCC Form 301.

Respectfully submitted,

**CHANNEL TWENTY
TELEVISION COMPANY, L.L.C.**

By: 
Barry D. Wood
Ronald D. Maines

WOOD & BRINTON,
CHARTERED
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037
(202) 293-5333

Its counsel

Dated: February 17, 1998